

Internal Revenue Service

Department of the Treasury
Washington, DC 20224

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Third Party Communication: None
Date of Communication: Not Applicable

Person To Contact:

, ID No.

Telephone Number:

In Re:

Refer Reply To:
CC:PSI:B04
PLR-103291-13

Date:
July 22, 2013

Legend:

Decedent =
Son =
Daughter =
Trust =
Law Firm =
Investment Firm =
Year 1 =
Year 2 =
Date 1 =
X

Dear :

This responds to your personal representative's letter of January 9, 2013, requesting an extension of time pursuant to § 301.9100-3 of the Procedure and Administration Regulations to file a Form 8939 (Allocation of Increase in Basis for Property Acquired from a Decedent) to make the Section 1022 Election and to allocate basis provided by section 1022 of the Internal Revenue Code (Code) to eligible property transferred as a result of Decedent's death.

The facts and representations submitted are as follows. Decedent died in 2010 survived by Son and Daughter. Decedent's will appointed Son and Daughter as the personal representatives of her estate. Decedent's will provided that the residue of her estate is to pass to Trust. Son and Daughter are the co-trustees of Trust.

Prior to her death, Decedent timely filed Forms 709, United States Gift (and Generation-Skipping Transfer) Tax Returns, reporting gifts she made in Year 1 and Year 2. The Year 1 Form 709 reported that Decedent had made four gifts, two cash gifts for the benefit of a grandson and two other gifts of significant amounts of cash, one gift to Son and one gift to Daughter. The form also reported that Decedent paid gift tax

in the amount of \$X in connection with these gifts. The Year 2 Form 709 reported that Decedent had made two gifts of significant amounts of cash, one gift to Son and one gift to Daughter. Investment Firm prepared the Year 1 Form 709. It has been represented that Investment Firm was aware of the Year 2 Form 709.

Son and Daughter, as personal representatives of Decedent's estate, retained Law Firm and Investment Firm to advise them as to the tax obligations of the estate. Law Firm was not informed by Investment Firm or Son and Daughter of the prior taxable gifts reported on the Year 1 and Year 2 Forms 709. Investment Firm provided an affidavit to the effect that it failed to inform Law Firm of the existence of the Year 1 Form 709. As a result, Law Firm believed Decedent's taxable estate was valued less than \$5,000,000. Law Firm advised Son and Daughter to file a Form 706, United States Estate (and Generation-Skipping Transfer) Tax Return, in order to allocate Decedent's available generation-skipping transfer (GST) exemption.

On Line 4 of the Form 706, which is entitled "[a]djusted taxable gifts (total gifts (within the meaning of section 2503) made by the decedent after Dec. 31, 1976, other than gifts that are includible in decedent's gross estate (sect. 2001(b))), an estate is required to report gifts made by the decedent during life. The estate listed zero on Line 4, indicating Decedent made no prior taxable gifts.

Prior to filing the estate tax return, Investment Firm and Son and Daughter reviewed the form. Son and Daughter signed the Form 706 under penalties of perjury attesting that they had examined the return, including accompanying schedules and statements, and to the best of their knowledge and belief, the return was true, correct and complete.

On or about Date 1, the Internal Revenue Service started to examine the estate's Form 706. In addition to the gifts reported on the Forms 709, the audit revealed that Decedent had made other gifts that should have been reported on Line 4 of the estate's Form 706.

Son and Daughter, as co-trustees of Trust, are requesting an extension of time pursuant to § 301.9100-3 to file the Form 8939 to make the Section 1022 Election and to allocate basis provided by section 1022 to eligible property transferred as a result of Decedent's death.

Law and Analysis:

Section 1022(a) provides that property acquired from a decedent who died after December 31, 2009, is treated as transferred by gift, and the basis of the person acquiring the property from such a decedent is the lesser of the adjusted basis of the decedent or the fair market value of the property at the date of the decedent's death.

Section 1022(b)(1) provides, in general, that the basis of property under section 1022(a) is increased by basis increase that is allocated to the property.

Section 1022(b)(2)(A) provides, in general, that basis increase is the portion of the aggregate basis increase that is allocated to the property.

Section 1022(b)(2)(B) and (C) provide that the aggregate basis increase is \$1,300,000; and that the aggregate basis increase is increased by--(i) the sum of the amount of any capital loss carryover under section 1212(b), and the amount of any net operating loss carryover under section 172 that would (but for the decedent's death) be carried from the decedent's last taxable year to a later taxable year of the decedent, plus (ii) the sum of the amount of any losses that would have been allowable under section 165 if the property acquired from the decedent had been sold at fair market value immediately before the decedent's death.

Section 1022(c)(1) provides that in the case of property that is qualified spousal property, the basis of such property under section 1022(a) (as increased under section 1022(b)) is increased by spousal property basis increase allocated to the property.

Section 1022(c)(2)(A) provides, in general, that spousal property basis increase is the portion of the aggregate spousal property basis increase which is allocated to the property. Section 1022(c)(2)(B) provides that the aggregate spousal property basis increase is \$3,000,000.

Section 1022(d)(1)(A) provides, in general, that the basis of property acquired from a decedent may be increased under section 1022(b) or (c) only if the property was owned by the decedent at the time of death. Section 1022(d)(1)(B) describes property that is considered to be owned by the decedent at the time of death.

Section 1022(d)(2) provides that the basis adjustments under sections 1022(b) and (c) shall not increase the basis of any interest in property above its fair market value in the hands of the decedent as of the date of the decedent's death.

Section 1022(d)(3) provides, in general, that the executor is to allocate the basis adjustments under sections 1022(b) and (c) on the return required by section 6018 and that any allocation made may be changed only as provided by the Secretary.

Section 1022(e) describes property that is considered to be acquired from the decedent for purposes of section 1022.

Subtitle A of title V of the Economic Growth and Tax Relief Reconciliation Act of 2001, P.L. 107-16 (115 Stat. 76-81), enacted section 2210, which made chapter 11 (the estate tax) inapplicable to the estate of any decedent who died in 2010 and chapter 13 (the GST tax) inapplicable to generation-skipping transfers made in 2010. On

December 17, 2010, Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act of 2010 (TRUIRJCA), P.L. 111-312 (124 Stat. 3296), became law, and section 301(a) of TRUIRJCA retroactively reinstated the estate and GST taxes. However, section 301(c) of TRUIRJCA allows the executor of the estate of a decedent who died in 2010 to elect to apply the Code as though section 301(a) of TRUIRJCA did not apply with respect to chapter 11 and for property acquired or passing from a decedent (within the meaning of section 1014(b)). Thus, section 301(c) of TRUIRJCA allows the executor of the estate of a decedent who died in 2010 to elect not to have the provisions of chapter 11 apply to the decedent's estate, but rather, to have the provisions of section 1022 apply (the Section 1022 Election).

Notice 2011-66, 2011-35 I.R.B. 184, section I.A. provides that the executor of the estate of a decedent who died in 2010 makes the Section 1022 Election by filing a Form 8939 on or before November 15, 2011. Notice 2011-76, 2011-40 I.R.B. 479, extended the due date of the Form 8939 and thus, the election from November 15, 2011 to January 17, 2012.

Notice 2011-66, section I.D.1, provides that the Internal Revenue Service will not grant extensions of time to file a Form 8939 and will not accept a Form 8939 filed after the due date except in four limited circumstances provided in section I.D.2. Under this section of Notice 2011-66, an executor may apply for relief under § 301.9100-3.

Section 301.9100-1(c) provides that the Commissioner has discretion to grant a reasonable extension of time under the rules set forth in §§ 301.9100-2 and 301.9100-3 to make a regulatory election, or a statutory election (but no more than 6 months except in the case of a taxpayer who is abroad), under all subtitles of the Code except subtitles E, G, H, and I.

Section 301.9100-3 provides the standards used to determine whether to grant an extension of time to make an election whose due date is prescribed by a regulation (and not expressly provided by statute). Under § 301.9100-1(b), a regulatory election includes an election whose due date is prescribed by a notice published in the Internal Revenue Bulletin.

Requests for relief under § 301.9100-3 will be granted when the taxpayer provides the evidence to establish to the satisfaction of the Commissioner that the taxpayer acted reasonably and in good faith, and that granting relief will not prejudice the interests of the Government.

Section 301.9100-3(b)(1)(v) provides that a taxpayer is deemed to have acted reasonably and in good faith if the taxpayer reasonably relied on a qualified tax professional, including a tax professional employed by the taxpayer, and the tax professional failed to make, or advise the taxpayer to make, the election.

Section 301.9100-3(b)(2) provides that a taxpayer will not be considered to have reasonably relied on a qualified tax professional if the taxpayer knew or should have known that the professional was not: (i) competent to render advice on the regulatory election; or (ii) aware of all relevant facts.

Based on the facts submitted and the representations made, we conclude that the requirements of § 301.9100-3 have not been satisfied. Son and Daughter received significant outright cash gifts from Decedent prior to her death. Son and Daughter failed to inform Law Firm of the existence of these gifts. Son and Daughter reviewed and signed the Form 706 under penalties of perjury attesting that the form was true, correct and complete. Son and Daughter did not reasonably rely on Law Firm or Investment Firm within the meaning of § 301.9100-3(b)(2)(ii). Accordingly, the request for the extension of time to make the Section 1022 Election is denied.

Except as expressly provided herein, no opinion is expressed or implied concerning the tax consequences of any aspect of any transaction or item discussed or referenced in this letter.

This ruling is directed only to the taxpayer requesting it. Section 6110(k)(3) provides that it may not be used or cited as precedent.

The rulings contained in this letter are based upon information and representations submitted by the taxpayer and accompanied by a penalty of perjury statement executed by an appropriate party. While this office has not verified any of the material submitted in support of the request for rulings, it is subject to verification on examination.

Sincerely,

James F. Hogan

James F. Hogan
Chief, Branch 4
(Passthroughs & Special Industries)

Enclosures:

Copy for section 6110 purposes

Copy of this letter